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DECISION



Melody

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

20878

FILE: B-201740.2; B-201923

DATE: February 22, 1982

MATTER OF: Covan World-Wide Moving, Inc; Coleman
American Moving Services, Inc.

DIGEST:

1. A protest allegation that the Small Business Administration (SBA) misinterpreted its regulations in finding that the protester's self-certification on a particular procurement was invalid, essentially related to SBA's determination that the protester did not qualify as a small business for that procurement, and thus will not be reviewed by our Office; GAO will not consider matters directly related to size status determinations in view of SBA's statutory authority to conclusively determine the size status of bidders. 15 U.S.C. § 637(b)(6).
2. Where SBA advised the contracting officer prior to award that the protester would shortly be recertified as a small business, but also advised that the protester was not a small business for the current procurement, it was reasonable and not improper for the contracting officer to make an award to the next lowest bidder.

Covan World-Wide Moving, Inc. and Coleman American Moving Services, Inc. protest the Department of the Army's rejection of their bids under invitation for bids (IFB) Nos. DAKF19-81-B-0006 (hereinafter 0006) and DABT19-81-B-0001 (hereinafter 0001), respectively. Both solicitations were set aside for small businesses and sought bids for moving, storage and crating services to be provided personnel at Fort Riley (IFB 0006) and Ft. Leavenworth (IFB 0001), Kansas. The Army rejected the bids based on advice received from the Small Business Administration (SBA), that neither protester qualified as a small business under the

size standard applicable to this procurement (average annual receipts of \$7 million). The protesters, wholly-owned subsidiaries of Coleman American Companies, Inc., maintain they did qualify as small businesses. We dismiss the protest to the extent the protesters allege that SBA's size determination was erroneous. We deny that portion of the protest alleging that the contracting officers acted improperly in rejecting the bids of Covan and Coleman. Although the facts of the two protests differ slightly, they involve essentially the same issues and we will therefore consider both in this decision.

In a 1973 size determination, Covan and Coleman were found to be other than small businesses, and thus ineligible for award, on a procurement with a \$5 million size standard. Neither firm was recertified as small by SBA prior to the bid openings for the procurements in question. Under SBA's regulations, once a bidder has been determined other than small, that bidder ordinarily cannot in good faith certify itself as small for subsequent procurements unless SBA has, in the interim, recertified it as such. 13 C.F.R. § 121.3-4(d).

In its bid on IFB 0006, Covan certified that it was a small business under the \$7 million size standard. Covan was the apparent low bidder on a portion of the IFB, but because the next low bidder challenged Covan's small business status, the contracting officer referred the matter to SBA's Kansas City Regional Office for a formal size determination. See 13 C.F.R. § 121.3-4, et seq. (1980). Covan failed to supply certain requested financial data which SBA deemed necessary for a proper evaluation and thus, in a size determination dated December 29, 1980 (SD-VII-80-K), SBA concluded that, notwithstanding its self-certification, Covan was other than a small business under the applicable size standard.

Covan did not appeal this determination to SBA's Size Appeals Board, see 13 C.F.R. § 121.3-6, but instead, by letter of January 7, 1981, asked the Kansas City Regional Office to "reconsider" its December 29 ruling. This time, Covan submitted the requested data, and in a size determination dated January 9, 1981 (SD-VII-82-K), SBA "recertified" Covan as a small business under the \$7 million size standard. Earlier on January 9, the contracting officer had telephoned SBA to determine whether Covan's status had changed since December 29, and was informed that it had not--that Covan was not a small business for this procurement. SBA did advise that Covan likely would be recertified as a small business shortly. Relying on this information, the contracting officer awarded a contract to the second low bidder on January 12, the following Monday.

The relevant facts in Coleman's protest against the award under IFB 0001 are essentially the same as those above. Coleman, too, failed to submit the requisite information to the Kansas City Regional Office, and was found to be other than a small business in a December 29 size determination (SD-VII-81-K). Like Covan, Coleman requested a "reconsideration" on January 7 and was recertified as a small business on January 9 in the same size determination (SD-VII-82-K) which recertified Covan. The contracting officer telephoned SBA on January 16 to determine whether Coleman's status had changed and was reportedly told only that the December 29 ruling had not changed. Relying on this information, the contracting officer proceeded with an award to the second low bidder. The Army reports that it was not formally notified of Coleman's recertification until SBA supplied this information on February 9.

SBA's advice to the contracting officers that Covan and Coleman were not small businesses for these procurements was based on its interpretation of its regulations that since the firms had been found not small in 1973 and had never been recertified by SBA, they were not eligible to certify themselves as small on these procurements.

SBA reasoned further that the January 9 recertifications established Covan's and Coleman's small business status only prospectively; the recertification did not revert back and validate the bidders' self-certifications in these procurements. Thus, SBA concluded, the unfavorable December 29 size determinations were determinative of the protesters' status for these procurements.

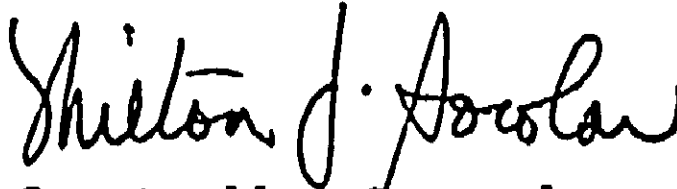
The protesters maintain that SBA's conclusions and advice were based on a misinterpretation of its regulations. In fact, they assert, recertification is a prerequisite to self-certifying only where a bidder found to be other than small on one procurement wishes to self-certify on a subsequent procurement subject to the same or a lower size standard. The protesters insist that since they were found other than small on a procurement with a \$5 million size standard in 1973, and the size standard was \$7 million for both of the procurements here, the self-certifications in their bids on these procurements were valid, and no recertification was necessary. For this reason, they explain, they asked the Kansas City Regional Office to "reconsider" and thereby reverse its December 29 ruling; they did not request a recertification. The protesters submit that the January 9 size determination should be deemed a reversal of the December 29 determination which, considered together with their self-certifications, established their small business status for these procurements. The protesters conclude they were entitled to the awards.

The protesters' allegation that SBA misinterpreted its regulations regarding self-certification relates essentially to SBA's determination that the protesters did not qualify as small businesses for these procurements. Because SBA is empowered under 15 U.S.C. § 637(b)(6) (1976) to conclusively determine the size status of bidders, our Office generally will review matters directly related to size

status determinations only where there is a prima facie showing of bad faith or fraud on SBA's part. Roy Anderson, Jr., Inc., B-204093, September 4, 1981, 81-2 CPD 200; Wyle Laboratories, B-186526, September 7, 1976, 76-2 CPD 223. Since the protesters have neither alleged nor submitted evidence of bad faith or fraud, this portion of the protest is dismissed.

We also believe the contracting officers acted properly in deciding to make awards to the second low bidders. As already noted, neither contracting officer was aware, prior to making award, that the protesters had been recertified as small businesses (indeed, the contracting officer for IFB 0001 was not formally advised of Coleman's recertification until February 9, several weeks after the award). At most, it appears the contracting officers anticipated that Covan and Coleman might be recertified and for that reason, immediately prior to award, solicited information from SBA as to the firms' current status. In both instances, SBA advised that the protesters were not small for these procurements based on the December 29 size determinations. The contracting officers relied on this information in making the awards. We think it was reasonable for them to do so. See Southwestern Enterprises, Incorporated, B-195084, February 5, 1980, 80-1 CPD 90. We accordingly find no basis for disturbing the awards.

The protest is dismissed in part and denied in part.

for 
Comptroller General
of the United States